



DEPARTMENT OF THE NAVY
BOARD FOR CORRECTION OF NAVAL RECORDS
2 NAVY ANNEX
WASHINGTON DC 20370-5100

HD:hd
Docket No: 04195-02
13 December 2002

From: Chairman, Board for Correction of Naval Records
To: Secretary of the Navy

Subj: LCDE [REDACTED] USNR [REDACTED]
REVIEW OF NAVAL RECORD

Ref: (a) Title 10 U.S.C. 1552

Encl: (1) DD Form 149 dtd 15 Apr 02 w/attachments
(2) Record of Subject's Art 138 proceedings
(3) PERS-00H memo dtd 21 Aug 02
(4) PERS-311 memo dtd 12 Nov 02
(5) Subject's naval record

1. Pursuant to the provisions of reference (a), Subject, hereinafter referred to as Petitioner, filed enclosure (1) with this Board requesting, in effect, that the applicable naval record be corrected by removing the fitness report for 1 November 1998 to 16 April 1999. A copy of the contested report is at Tab A.
2. The Board, consisting of Messrs. Grover, Neuschafer and Pauling, reviewed Petitioner's allegations of error and injustice on 12 December 2002, and pursuant to its regulations, determined that the corrective action indicated below should be taken on the available evidence of record. Documentary material considered by the Board consisted of the enclosures, naval records, and applicable statutes, regulations and policies.
3. The Board, having reviewed all the facts of record pertaining to Petitioner's allegations of error and injustice, finds as follows:
 - a. Before applying to this Board, Petitioner exhausted all administrative remedies available under existing law and regulations within the Department of the Navy.
 - b. Enclosure (1) was filed in a timely manner.
 - c. Petitioner, now a Naval Reserve lieutenant commander on inactive duty, received the contested fitness report while she was serving in the same grade on extended active duty. Her regular reporting senior at the time, the Chief of Naval Operations (CNO), delegated to his executive assistant (EA) his reporting senior authority for the report in question. This report, submitted on the occasion of Petitioner's detachment, reflects per se adverse marks in blocks 35 ("military bearing/character") and 42 ("promotion recommendation"). She was not

compared with any other lieutenant commander. The comments section, block 41, included the following justification for the mark in block 35:

However, during this reporting period, she began living with a married male officer also assigned to the staff. This officer left his wife and children to live with [Petitioner]. As a result, she was relieved of her duties due to this unacceptable conduct.

Block 41 also stated "[Petitioner] is not recommended for career milestones or promotion." On the contested report, she indicated that she intended to submit a statement, but no such statement appears in her record with the report.

d. Petitioner maintains that she engaged in no improper conduct. She asserts she merely permitted a fellow staff officer, a commander who had been confiding in her about his severe marital difficulties, to sleep on the spare futon in her living room, while she was away on travel, until his permanent change of station. She even took and passed a polygraph examination to support her insistence that she did not engage in any type of sexual activity with the commander. Her command did not take disciplinary action against her because, she believes, they had no case to support such action. She contends that the fitness report at issue was based on a flawed informal command investigation, which was conducted in an unfair manner and did not address the derogatory matters cited in block 41; and that the report was used as an improper substitute for punishment. She further objects that after she had received two outstanding fitness reports from her regular reporting senior, he delegated reporting senior authority to his EA, although neither her duty station nor her billet had changed; and she complains that her requests to discuss the contested report with either her regular reporting senior or the delegated reporting senior were denied.

e. On 29 October 1999, Petitioner filed a complaint of wrongs under Article 138, Uniform Code of Military Justice (UCMJ), against her delegated reporting senior, the EA, seeking relief from the fitness report in question. On 16 December 1999, the general court-martial authority, the Vice CNO, determined that no relief was warranted. He found no merit in Petitioner's complaint about the denial of her requests to discuss the contested report with the CNO or his EA, stating she was told the EA would meet with her for this purpose if she first acknowledged and waived her rights against self-incrimination under Article 31, UCMJ, but she did not request to waive her rights, nor did she waive them. The Vice CNO also specifically rejected Petitioner's contention that the contested fitness report amounted to punishment. On 15 February 2000, the Assistant Secretary of the Navy (Manpower and Reserve Affairs) approved the action of the Vice CNO. Copies of Petitioner's complaint (less enclosures) with two endorsements, the action of the Vice CNO, and the action of the Assistant Secretary are at enclosure (2).

f. In correspondence attached as enclosure (3), PERS-00H, the Navy Personnel Command (NPC) office having cognizance over equal opportunity matters, has commented to the effect that Petitioner's request should be approved. They objected to the comments in

block 41 of the contested report, stating they do not explain why Petitioner's conduct resulted in an adverse mark in block 35; that the narrative "forces the reader to make assumptions, which may or may not be factual"; and that the comment "This officer left his wife and children to live with [Petitioner]" relates to the male officer's conduct, rather than Petitioner's, and "serves no purpose other than to provoke a negative reaction from the reader." Finally, PERS-00H concluded that the report at issue was used as punishment, as Petitioner had contended.

g. In correspondence attached as enclosure (4), PERS-311, the NPC office having cognizance over officer fitness reports, also commented to the effect that the contested fitness report should be removed. They noted that the pertinent fitness report directive, Bureau of Naval Personnel Instruction 1610.10, enclosure (2), Annex B, paragraph B-6.d.(3), states "A delegated reporting senior's authority may be limited to certain pay grades, but must include all subordinate members in those pay grades," yet PERS-311 had no record of receiving from the reporting senior who signed Petitioner's report any additional fitness reports on other lieutenant commanders. They further stated that the material submitted with Petitioner's application "lends considerable doubt as to the fitness report [in question] being a fair appraisal of [her] performance"; and that in view of the PERS-00H opinion at enclosure (3), they "believe that justice may be better served" by removing the report.

CONCLUSION:

Upon review and consideration of all the evidence of record, and especially in light of the contents of enclosures (3) and (4), the Board finds the existence of an injustice warranting the following corrective action.

RECOMMENDATION:

a. That Petitioner's naval record be corrected by removing therefrom the following fitness report and related material:

Date of Report	Reporting Senior	Period of Report From To
99Apr16	CAPT J. [REDACTED] USN	98Nov01 99Apr16

b. That there be inserted in Petitioner's naval record a memorandum in place of the removed report containing appropriate identifying data concerning the report; that the memorandum state that the report has been removed by order of the Secretary of the Navy in accordance with the provisions of federal law and may not be made available to selection boards and other reviewing authorities; and that such boards may not conjecture or draw any inference as to the nature of the report.

c. That any material or entries inconsistent with or relating to the Board's recommendation be corrected, removed or completely expunged from Petitioner's record and that no such entries or material be added to the record in the future.

d. That any material directed to be removed from Petitioner's naval record be returned to the Board, together with a copy of this Report of Proceedings, for retention in a confidential file maintained for such purpose, with no cross reference being made a part of Petitioner's naval record.

4. It is certified that a quorum was present at the Board's review and deliberations, and that the foregoing is a true and complete record of the Board's proceedings in the above entitled matter.

ROBERT D. ZSALMAN
Recorder

Jonathan S. Ruskin
JONATHAN S. RUSKIN
Acting Recorder

5. The foregoing report of the Board is submitted for your review and action.

W. Dean Pfeiffer
W. DEAN PFEIFFER

Reviewed and approved:

William A. Navas, Jr.
11/9/03

William A. Navas, Jr.
Assistant Secretary of the Navy
(Manpower and Reserve Affairs)



DEPARTMENT OF THE NAVY

NAVY PERSONNEL COMMAND
5720 INTEGRITY DRIVE
MILLINGTON TN 38055-0000

1610
PERS-00H/346
21 Aug 02

MEMORANDUM FOR EXECUTIVE DIRECTOR, BOARD FOR CORRECTION
OF NAVAL RECORDS

Via: Assistant for BCNR Matters, PERS-00ZCB

Subj: REQUEST FOR COMMENTS AND RECOMMENDATIONS IN CASE OF
LCDR [REDACTED] USNR [REDACTED]

Ref: (a) PERS-00ZCB memo 5420 of 05 Aug 02

Encl: (1) BCNR File 04195-02 with service record

1. Reference (a) requested an advisory opinion in response to Lieutenant Commander [REDACTED] request to remove from her permanent record a fitness report for the period 98NOV01 to 99APR16.

2. Upon review of enclosure (1), I find the comments in block 41 of Lieutenant Commander [REDACTED] fitness report for the period 98NOV01 to 99APR16, specifically, the comments listed under *35 to be inappropriate. The comment "However, during this reporting period, she began living with a married male officer also assigned to the staff," does not explain why this conduct resulted in a grade of 1.0, which is below standards. Did Lieutenant Commander [REDACTED] commit an act of adultery, an act of fraternization, or disobey a direct order to stop living with the male officer? The comment forces the reader to make assumptions, which may or may not be factual.

3. The comment in Lieutenant Commander [REDACTED] fitrep "This officer left his wife and children to live with Lieutenant Commander [REDACTED] refers to the alleged conduct and intentions of the male officer involved, not to the conduct of Lieutenant Commander [REDACTED] and therefore should not be mentioned in her fitness report. This comment serves no purpose other than to provoke a negative reaction from the reader.

4. In conclusion, the fitness report was used as punishment, which is prohibited by the Navy Performance Evaluation and

Subj: REQUEST FOR COMMENTS AND RECOMMENDATIONS IN CASE OF
LCDR [REDACTED] USNR, [REDACTED]

Counseling System (BUPERSINST 1610.10, enclosure 1, page 4,
paragraph 13). It is therefore, my recommendation that
Lieutenant Commander [REDACTED] fitness report for the period
98NOV01 to 99APR16 be removed from her permanent record.

[REDACTED]

Director, Navy Equal Opportunity
Office (PERS-00H)



DEPARTMENT OF THE NAVY
NAVY PERSONNEL COMMAND
5720 INTEGRITY DRIVE
MILLINGTON TN 38055-0000

1610
PERS-311
12 November 2002

MEMORANDUM FOR THE EXECUTIVE DIRECTOR, BOARD FOR CORRECTION OF
NAVAL RECORDS

Via: PERS/BCNR Coordinator (PERS-00ZCB)

Subj: LCDR [REDACTED] USN [REDACTED]

Ref: (a) BUPERSINST 1610.10 EVAL Manual
(b) PERS-OOH memo 1610 PERS-OOH/346 of 21 August 02

Encl: (1) BCNR File

1. Enclosure (1) is returned. The member requests the removal of her fitness report for the period 1 November 1998 to 16 April 1999.

2. Based on our review of the material provided, we find the following:

a. A review of the member's headquarters record revealed the report in question to be on file. It is signed by the member acknowledging the contents of the report and her right to submit a statement. The member indicated she did desire to submit a statement. PERS-311 has not received the member's statement and reporting senior's endorsement.

b. The report in question is a Detachment of Individual/Regular report. The member alleges the report was used as punishment.

c. Evaluating a subordinate officer's performance and making recommendation concerning promotion and assignments are the responsibilities of the reporting senior. These duties are accomplished in the fitness report. In reviewing petitions that question the exercise of the evaluation responsibilities, we must determine if the reporting senior abused his/her discretionary authority. We must determine if there is any rational basis to support the reporting senior decisions, and whether the reporting senior actions were the result of improper motive. However, we must start from the position that the reporting senior exercised his/her discretion properly. Therefore, for us to recommend relief, the petitioner has to demonstrate that the reporting senior did not properly exercise his/her authority. In other words, the petitioner must show that either there is no rational support for the reporting senior's actions or that the reporting senior acted for an illegal or improper purpose. The petitioner must do more than just assert the improper exercise of discretion; she must provide evidence to support the claim. I believe Lieutenant Commander [REDACTED] done so.

d. Captain [redacted] states he was verbally delegated the authority to prepare and sign Lieutenant Command [redacted] fitness report. Reference (a), Annex B, paragraph d.3 states; "A delegated reporting senior's authority may be limited to certain pay grades, but must include all subordinate members in those pay grades". PERS-311 has no record of receiving additional fitness reports on O-4's signed by Capt [redacted]

e. In view of the material submitted with the member's petition and a letter of support from her concurrent reporting senior at the time of the incident lends considerable doubt as to the fitness report being a fair appraisal of Lieutenant Command [redacted] performance.

e. The member proves the report to be unjust.

3. While we are always reluctant to recommend removal of a fitness report, and in view of reference (b), we believe that justice may be better served by removal of the fitness report.

[redacted signature]

Performance
Evaluation Branch